Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

In the

# Supreme Court of the United States

October Term, 1999-2000

JACK FERM,

*Defendant-Appellant,*

vs.

U.S. TRUSTEE,

*Plaintiff-Appellee.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

Jack Ferm
*Counsel of Record in Pro Se*
6130 W. Flamingo Rd. #345
Las Vegas, Nevada 89103
(702) 362-5047

*Defendant-Appellant in Pro Se*

74pp

## QUESTIONS PRESENTED

1. CAN CONGRESS CONSTITUTIONALLY REQUIRED A PUBLIC DISCLOSURE OF A PRIVATE SOCIAL SECURITY NUMBER ("SSN") ON PUBLIC DOCUMENTS?

2. IS THE SOCIAL SECURITY NUMBER PROTECTED FROM PUBLIC DISCLOSURE UNDER THE CONCEPT OF INFORMATIONAL PRIVACY?

3. DID THE BANKRUPTCY COURT VIOLATE A DOCUMENT PREPARER'S RIGHT IN INFORMATIONAL PRIVACY WHEN IT REQUIRED THAT HIS SOCIAL SECURITY NUMBER MUST BE REVEALED IN PUBLIC RECORDS?

4. DID THE BANKRUPTCY COURT INFRINGE ON FERM'S RIGHT TO PURSUE A COMMON OCCUPATION AND HIS RIGHT TO DUE PROCESS WHEN IT CONDITIONED HIS PARTICIPATION IN A COMMON OCCUPATION UPON DISCLOSING HIS SSN IN PUBLIC RECORDS?

5. DID THE BANKRUPTCY COURT DENY FERM HIS RIGHT TO EQUAL PROTECTION OF THE LAWS WHEN IT REQUIRED HIM TO REVEAL ALL NINE DIGITS OF HIS SSN IN PUBLIC RECORDS?

6. DID FERM'S SECURITY CONCERNS ABOUT THE RELEASE OF HIS SSN IN THE PUBLIC RECORD, IN LIGHT OF HIS UNIQUE SITUATION, JUSTIFY NON-COMPLIANCE WITH 11 USC 110(c) UNDER THE "REASONABLE CAUSE" EXCEPTION?

7. DID THE BANKRUPTCY COURT VIOLATE THE PRIVACY ACT BY REQUIRING A PUBLIC

DISCLOSURE OF FERM'S SSN WHEN ITS STATEMENT OF ASSISTANCE FORMS FAILED TO CITE WHETHER COLLECTION OF THE SSN WAS MANDATORY, OR BY WHAT AUTHORITY IT COLLECTED AND MADE PUBLIC THESE NUMBERS AND HOW THE SSN WOULD BE USED?

8. WAS FERM DENIED EQUAL PROTECTION UNDER THE BANKRUPTCY CODE SINCE HE WAS REQUIRED TO MAKE A PUBLIC DISCLOSURE OF HIS SSN, AND SINCE PARALEGALS WHO WORK FOR ATTORNEYS WHO PERFORM THE SAME FUNCTION WERE NOT REQUIRED TO MAKE SUCH A DISCLOSURE?

9. DID CONGRESS USE THE LEAST INTRUSIVE MEANS TO ACCOMPLISH THEIR GOAL OF PROTECTING DEBTORS FROM FRAUD?

10. WOULD THE LEAST INTRUSIVE MEANS HAVE BEEN TO REQUIRE A PRIVATE DISCLOSURE AND USE OF AN ALTERNATE IDENTIFIER NUMBER?

## LIST OF PARTIES

Petitioner consists of Jack Ferm, a document preparer.

The Bankruptcy Court first initiated proceedings against Ferm for refusing to make a public disclosure of his social security number ("SSN"). He had made private disclosure to the intake supervisor at the Bankruptcy Court. The Bankruptcy Court, the District Court, and the 9th Circuit Court of Appeals have all held that Ferm has no protectable interest in his SSN and that Congress may require public disclosure.

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## OPINION BELOW

Petitioner seeks review of the opinion below filed by the United States Court of Appeals for the 9th Circuit on October 7, 1999. Petitioner has not received any copy from the Court of Appeals and was recently informed that the opinion was on the Internet and obtained a copy through the Internet.

The procedural history of this case includes hearings before the Bankruptcy Court, at which time Ferm objected to making a public disclosure of his social security number ("SSN"), and requested the use of an alternate number for use on the documents he prepared for his clients filing with the Bankruptcy Court.

On August 18, 1995, Ferm's request was denied.

On September 5, 1995, Ferm submitted documents which reflected that his SSN was on file with the intake supervisor. No SSN was placed on this document.

On September 21, 1995, Bankruptcy Judges Gregg W. Zive and Linda Riegle issued order to show cause, requiring Ferm to appear.

On May 20, 1996, Judge Riegle issued orders on both matters and fined Ferm $2,000.

On May 30, 1996, Ferm appealed both decisions to the District Court.

On July 30, 1997, the District Court entered its opinion affirming the Bankruptcy Order which stated that Ferm had no protectable interest in keeping his SSN from the general public view. Ferm appealed to the 9th Circuit.

On October 7, 1999, the 9th Circuit issued its opinion affirming the District Court opinion that there is no right or expectation of privacy in regards to Ferm's SSN and that Congress can require citizens to make public disclosures of this private number.

This petition for a Writ of Certiorari follows. The issue is not the disclosure of the SSN – it is the forced public disclosure of that number.

## JURISDICTION

The Court enjoys jurisdiction to review the opinions and mandates of the 9th Circuit Court of Appeals pursuant to 28 USC Sec 1251(1). The Petition for Certiorari should be filed within 90 days of the 9th Circuit opinion. That 90-day period runs from October 7, 1999. The petition therefore is due on or before January 6, 2000, and is timely filed by that date.

Service has been made on the government Defendants by their counsel of record, and service has been made on the Solicitor General, to the extent required by U.S. Supreme Court Rule 29.4.

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

### U.S. Constitution Article 1 Section 8

[POWERS OF CONGRESS]

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.

### U.S. Constitution Amendment IV

[SEARCHES AND SEIZURES]

**Unreasonable searches and seizures.** The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### U.S. Constitution Amendment V

[RIGHTS OF PERSONS]

**Prosecution by presentment; indictment; double jeopardy; self-incrimination; due process; property taken for public use.** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

nor shall private property be taken for public use, without just compensation.

**U.S. Constitution Amendment VII**

[CIVIL TRIALS]

**Trial by jury in civil cases.** In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

**U.S. Constitution Amendment VIII**

[PUNISHMENT FOR CRIME]

**Excessive bail, fines; cruel and unusual punishments.** Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**Bankruptcy Reform Act 11 USC 110**

**Section 110. Penalty for persons who negligently or fraudulently prepare bankruptcy petitions.**

(a) In this section –

(1) "bankruptcy petition preparer" means a person, other than an attorney or an employee of an attorney, who prepares for compensation a document for filing; and

(2) "document for filing" means a petition or any other document prepared for filing by a debtor in a United States bankruptcy court or a United States district court in connection with a case under this title.



BEST AVA

(b)(1) A bankruptcy petition preparer who prepares a document for filing shall sign the document and print on the document the preparer's name and address.

(2) A bankruptcy petition preparer who fails to comply with paragraph (1) may be fined not more than $500 for each such failure unless the failure is due to reasonable cause.

(c)(1) A bankruptcy petition preparer who prepares a document for filing shall place on the document, after the preparer's signature, an identifying number that identifies individuals who prepared the document.

(2) For purposes of this section, the identifying number of a bankruptcy petition preparer shall be the Social Security account number of each individual who prepared the document or assisted in its preparation.



LABLE COPY

## STATEMENT OF THE CASE

**Nature of the Case**

This case involves 11 USC § 110(c) of the Bankruptcy Reform Act, which requires a non-attorney who prepares petitions for filing in bankruptcy court, to place his SSN as an "identifying number" on court documents. Here, Ferm was afraid to place all nine digits of his SSN in the public record because that same year, he avoided being the victim of identity fraud by the sole fact that the perpetrator lacked access to his SSN.

In his work as a bankruptcy petition preparer, Ferm sough to comply with 11 USC § 110(c) by giving his entire SSN to court personnel but releasing only the last digits of his SSN in court documents. The Bankruptcy Court imposed a fine upon Ferm, $200 for each time he failed to include his name, address or signature in court documents, and $100 for each time he omitted his SSN. (Bankruptcy Court's Memorandum Decision re: Order to Show Cause.)

Congress passed 11 USC § 110 in 1994 to address the alleged pressing problem of bankruptcy fraud. 11 USC § 110(c) specifically sought to regulate non-attorneys who assist debtors in bankruptcy courts, but lack legal training or ethics regulation. Simultaneously, however, our nation faced another threat, equally as widespread and harmful: "identify fraud." Armed with another's SSN, an unscrupulous person can obtain the other person's credit cards, welfare or social security benefits, new banking checks, and even a paycheck. Michael Quint, *Bank Robbers' Latest Weapon: Social Security Numbers*, N.Y. Times, Sept. 27, 1992, 7.

Over a century ago, Professors Louis Brandeis and Samuel Warren, in a *Harvard Law Review* article, lamented the erosion of personal privacy. They wrote that advances in

technology threatened individuals' "right to be left alone." 4 Harv. L.Rev. 193 (1890). Today, with the tremendous storage capacity and instant retrieval ability of interconnected computer databases, it is possible to wreak havoc upon another's personal and financial life with the press of a button. Individuals need legal protection from intrusions by technology now more than ever. Thus, Ferm requests that this Court construe 11 USC § 110(c)(2) to allow him to disclose to the public only the last four digits of his SSN.

**Prior Proceedings**

In 1995, Ferm filed a motion in the U.S. Bankruptcy Court for the District of Nevada ("Bankruptcy Court"),requesting permission to use the last several digits of his SSN rather than all nine digits in the court documents he prepared for filing. On August 30, 1995, the Bankruptcy Court denied Ferm's request, interpreting 11 USC § 110(c) to mean that a non-attorney petition preparer cannot use a non-SSN as an identifying number on court documents.

On September 5, 1995, Ferm filed *pro se* Chapter 7 bankruptcy petitions for Ibolya Rausch and Laorphus Crawford in Bankruptcy Court. On a form entitled "Statement of Assistance by Non-Attorney," which included spaces for the document preparer's SSN as well as name, address and signature, Ferm did not include his SSN. Instead Ferm gave his SSN to the Bankruptcy Court's intake supervisor and typed "See Gail Intake Supervisor" on the form.

On September 13, 1995, the Bankruptcy Court ordered Ferm to appear at a hearing to show cause as to why he should not be made to return Rausch's and Crawford's fees, not be fined for non-compliance with 11 USC § 110(c), and not be held in contempt for disobeying the August 30, 1995 order which prohibited his use of a non-SSN identifying number. In his response to the Court order, Ferm contended that because

11 USC § 110(c) violated his constitutional rights to privacy, work, and equal protection, as well as his rights under the Privacy Act of 1974, he had reasonable cause for non-compliance with the statute. On May 20, 1996, the Bankruptcy Court entered judgment declaring that 11 USC § 110(c) was constitutional, did not violate the Privacy Act, and that Ferm lacked reasonable cause for non-compliance.

The Bankruptcy Court fined Ferm $1,000, which included $200 for each omission of his name, address and signature in violation of § 110(b)(1), and $100 for each omission of his SSN in violation of § 110(c)(1). The Bankruptcy Court did not require Ferm to disgorge his fees because the Court found that the fees were not excessive. The Bankruptcy Court did not hold Ferm in contempt, because Ferm did not disobey the August 30, 1995 order by using a non-SSN identifying number. (Bankruptcy Court's Memorandum Order re: Order to Show Cause.)

On June 24, 1996, Ferm filed a *pro se* Notice of Election to Transfer the Appeal to the District Court pursuant to 28 USC § 158(c)(1). On July 7, 1997, the U.S. District Court for the District of Nevada ("District Court") affirmed the judgment of the Bankruptcy Court.

Ferm appealed the District Court opinion to the 9th Circuit Court of Appeals. The 9th Circuit Court, in its opinion, also stated in effect that Ferm had no protectable interest in his SSN. This petition to the Supreme Court follows.

Again Ferm reiterates that the issue is not that he is required to provide the Bankruptcy Court with his SSN. Ferm has done that. Ferm objects to the private number being placed in public records, where anyone can search through these records and have access to what was always deemed and intended to be a private number. The issue is the forced public disclosure.

## REASONS FOR GRANTING THE WRIT

This is an issue of grave public concern and interest. The public has lost almost every vestige of privacy. Personal identify is no longer sacred. More and more state and federal agencies are using the social security number as a personal identifier. State governments are requiring SSNs on documents and selling informational lists to business groups; these lists include the individual's name, address, and SSN. In Nevada, the legislature now requires a petition for divorce to contain on the document the parties' SSNs and places of employment. This information then becomes public record.

The Bankruptcy Court also requires that those who prepare petitions for others, if not a member of the state Bar, must also disclose in the public document their name, address, and SSN. The assignment of such a number is now mandatory for all citizens shortly after birth.

In 1995, the 4th Circuit Court had a case before it regarding the mandatory use of SSNs in order to vote. The SSN was then sold as a part of a list of registered voters. The 4th Circuit reasoned that the forced disclosure of the SSN was inappropriate. See *Greidinger v. Davis*, 988 F2d 1344 (4th Cir 1993).

Contrary to the 4th Circuit, the 9th Circuit has now held that there is no protectable interest in the SSN, and ruled that Congress can now require public disclosure. They also felt that the growing threat of consumer credit card fraud by obtaining another's credit through his SSN was not an issue important enough to protect the SSN from being publicly disclosed.

At the time the Social Security Act was passed, the identifying number was to be used solely for social security

purposes. Since the passage of the Act, the privacy of this number has gradually and consistently eroded, to where it is used for everything today! Unscrupulous persons can and do, by use of an SSN, a name and an address, take on the identity of individuals of good credit and assume their credit history, causing devastating consequences to the public and ultimately a loss to the lender. Judges as well are not above being the subject of identity theft. A recent article was published where several high ranking officers of the armed services had their credit stolen because Congress unthinkingly published in the Register their names, ranks, and SSNs.

There must be protection for the public. No person of average intelligence would complain about giving his SSN to a state or federal agency as a private disclosure, where the number is not made public. However, laws like 11 USC § 110 and the Nevada law, which require public disclosure, exceed constitutional informational privacy concerns.

A person has a reasonable expectation of privacy in regards to his credit and personal life. The SSN is the key to opening "Pandora's box" and to subjecting the public to financial loss and ruin.

By deciding this issue, the Court will resolve an important intercircuit conflict over the right or reasonable expectation of informational privacy involving the coerced use of the social security number on public documents, where anyone has access to obtain a copy of that information.

Second, the 9th Circuit's opinion did not address the issues raised on appeal, nor did the 9th Circuit even address their own concerns. For example, the 9th Circuit agreed with Ferm – See footnotes 2 and 3 of the 9th Circuit opinion, restated here:

> [2] Indiscriminate public access of SSNs, especially when accompanied by names and addresses, may

implicate the constitutional right to informational privacy. The harm that can be inflicted from the disclosure of an SSN to an unscrupulous individual is potentially financially ruinous. Unlike a telephone number or a name, an individual's SSN serves as a unique identifier that cannot be changed, and is generally not disclosed by individuals to the public.

[3] Judicial and legislative actions also support the conclusion that the disclosure of SSNs can raise serious privacy concerns. Courts have interpreted the Freedom of Information Act to forbid disclosure of SSNs. Congress has enacted measures to control the collection and dissemination of SSNs by government agencies, including the Privacy Act and the Driver Privacy Act.

9th Circuit Court opinion

The Court went on to state at 4,

[4] However, the right to informational privacy is not absolute. Rather, it is a conditional right that may be infringed on a showing of a proper governmental interest. To determine whether the government may disclose private information, courts engage in weighing competing interests. The government has the burden of showing that its use of the information would advance a legitimate state interest, and that its actions are narrowly tailored to meet the interest. In most cases, it will be the overall context that will dictate the tipping of the scales. (Emphasis mine)

The Court did not fully address the issue after determining that the government had the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored. The Court failed to discuss the distinction of private versus public

disclosure of the SSN, but instead were misdirected to somehow relating an argument that the petition should not be made public – missing the argument entirely.

The legislation at issue is not narrowly tailored to meet the interest of the Bankruptcy Court. A private disclosure would serve that end and meet the requirements and spirit of 11 USC § 110. The 9th Circuit determined that the public disclosure of SSNs is in the public's best interest? See page 3 paragraph 7, the 9th Circuit opinion.

It would almost appear that the 9th Circuit was arguing a different case. How would a public disclosure of a person – not a debtor but a typist -- serve the public interest?

Petitioner believes that 11 USC § 110 is irrational in that the same result could have been reached without putting a document petition preparer ("typist") at risk of financial loss in order to work. See *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955).

The disclosure could have been made to the Court and a separate number assigned, similar to how the state Bar assigns identifying numbers for its members.

Ferm contends that 11 USC § 110 is an arbitrary and unreasonable law which has no relation to the purpose of its passage. The public disclosure requirement provision does not serve the public health, safety, morals, or general welfare. *Wedges Lodges of California, Inc. v. City of Phoenix*, 24 F3d 56, 65 (9th Cir. 1994).

The Federal Courts below have thus far failed to grasp the issue. It is not a disclosure of the SSN; it is the forced public disclosure of that number which is the issue.

11 USC § 110, so far as it requires public rather than private disclosure, is not rationally related to any legitimate

governmental purpose. There can be no legitimate purpose of government that requires a public disclosure of a private number by a non-debtor, who merely prepares or types the documents for the debtors for filing.

This is an important issue of grave public concern. If Congress can require public disclosure of private information such as SSNs, what will be the next step?

If the public is made to disclose their SSN in public records, why not in newspapers? And who or what class would be next – Judges, Congressmen, Senators, Presidential Aids, even the President of the United States?

Certainly we are all equal under the law and all entitled to personal privacy in our business dealings and in our personal and credit lives. The public has no concern or legitimate need for a document petition preparer's SSN. The Bankruptcy Court may have such a need, but that need is not served by public disclosure.

## CONCLUSION

The Court should therefore grant the Petitioner a Writ of Certiorari in order to address the public concerns and to resolve important intercircuit conflicts, as well as to establish the bounds of informational privacy.

Respectfully submitted,

Jack Ferm
*Counsel of Record in Pro Se*
6130 W. Flamingo Rd. #345
Las Vegas, Nevada 89103
(702) 362-5047
*Defendant-Appellant in Pro Se*

**Dated: December 27, 1999**

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF NEVADA**

| | | |
|---|---|---|
| In re | ) | BK-S-95-23839-RCJ |
| | ) | Chapter 7 |
| LAORPHUS CRAWFORD, | ) | |
| | ) | Date: April 3, 1996 |
| Debtor. | ) | Time: 10:30 A.M. |
| | ) | |

**MEMORANDUM DECISION**
**RE: ORDER TO SHOW CAUSE**

On September 13, 1995, Laorphus Crawford filed a Chapter 7 petition pro se. On her "Statement of Assistance by Non-Attorney", she disclosed that she had paid $100 to "Jack Ferm" for assistance in filing the petition. A "Statement of Assistance by Non-Attorney Re: Filing The Bankruptcy Petition" was signed by Ferm. It failed to state his Social Security Number ("SSN"). Instead, Ferm provided his SSN to the bankruptcy court's intake supervisor, and in the place provided for disclosure of the SSN, stated: "See Gail Intake Supervisor." Ferm did not place his SSN on the petition, the schedules, the statement of financial affairs, or the "Chapter 7 Individual Debtor's Statement of Intention." Ferm also failed to provide his name, address and signature on the schedules, the statement of financial affairs, and the "Chapter 7 Individual Debtor's Statement of Intention."[1]

Earlier, on August 30, 1995, this Court had entered an order denying Ferm's motion to use an identifying number other than his SSN on petitions prepared by him.

[1] Ferm did not provide his name, address and signature on a "Statement of Assistance by Non-Attorney Re: Filing The Bankruptcy Petition."

Upon a motion by the United States Trustee ("UST") this Court ordered Ferm to show cause why he (1) should not disgorge the fee paid to him by the Debtor; (2) should not be fined for violation of 11 U.S.C. § 110(c); and (3) should not be held in contempt of the Court's August 30, 1995 order denying Ferm's motion to use an identifying number other than his SSN.

The UST argued in its show cause motion that Ferm failed to provide his SSN on 16 "documents",[2] that he failed to state his name and address on 14 "documents", and that failed to sign 15 "documents." The UST argues that each failure by Ferm to provide his name, address, signature and SSN constitutes a separate violation of 11 U.S.C. §§ 110(b)(1) and (c)(1). The UST asks that Ferm be fined, that he be required to disgorge his fee, and that he be found in contempt of the Court's order of August 30, 1995 denying Ferm's motion to use an identifying number other than his SSN.

Ferm argues that he has "reasonable cause" for not placing his SSN on the documents for filing, in that public disclosure of his SSN would leave him vulnerable to SSN-related fraud and "credit theft." He contends that disclosure of his SSN to the bankruptcy court's intake supervisor satisfies § 110(c)(2), and that Congress cannot require him to make his SSN "known to the general public." Ferm challenges § 110(c)(2) on a number of constitutional grounds, arguing that it violates his fundamental rights "to choose a calling or profession", "to personal security" and his "right to privacy." Ferm contends that a heightened standard of review applies, in that public disclosure of his SSN isn't "necessary [for] a compelling government interest." Ferm also challenges §

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[2] The UST describes each of the following documents filed in this case as a "document for filing": the petition, the summary of schedules, schedules A through J, the Chapter 7 Individual Debtor's Statement of Intention", the "Statement of Financial Affairs", the "Statement of Assistance by Non-Attorney in Regards to Filing This Petition", and the "Statement of Assistance By Non-Attorney Re: Filing the Bankruptcy Petition."

110(c)(2) on equal protection grounds, arguing that it establishes a "class within a class" because attorneys and their employees are also "document preparers" but aren't required to supply their SSNs. Finally, Ferm argues that § 110(c)(2) violates the Privacy Act.

These same arguments have been made by Ferm and the UST in In re Rausch, BK-S-95-23707. For the reasons given in that opinion, this Court shall fine Ferm $200 for each "document for filing" in violation of § 110(b)(1) which does not contain his name, address and signature ($600).[3] Furthermore, Ferm shall be fined $100 for violation of § 110(c)(1) for each "document for filing" that does not have his SSN ($400).[4]

Accordingly, Ferm's total fine is $1,000, which shall be payable to Patricia Gray, Clerk of the Bankruptcy Court, Foley Federal Courthouse, 300 Las Vegas Boulevard South, Las Vegas, Nevada 89101, within sixty (60) days of the entry of this Order.

The UST's request that Ferm be ordered to disgorge his fee is denied, given that the UST presented no evidence that it was in excess of the value of the services provided. Furthermore, the UST's request that Ferm be found in contempt is denied, given that the prior Order prohibited him from using an alternative number, and did not prohibit him from supplying the SSN to the intake supervisor only.

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[3] Ferm provided his name, address and signature on the "Statement of Assistance By Non-Attorney Re: Filing The Bankruptcy Petition." Ferm did not sign and place his name and addresses on the schedules, statement of affairs, or the "Chapter 7 Individual Debtor's Statement of Intention."

[4] Ferm did not place his SSN on the petition, the schedules, the statement of financial affairs, or the "Chapter 7 Individual Debtor's Statement of Intention."

IT IS SO ORDERED.

Dated this 20th day of May, 1996.

/s/ _____.
LINDA B. RIEGLE
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF NEVADA**

| | | |
|---|---|---|
| In re | ) | BK-S-95-23707-LBR |
| | ) | Chapter 7 |
| IBOLYA RAUSCH, | ) | |
| | ) | Date: March 14, 1996 |
| Debtor. | ) | Time: 10:30 A.M. |
| | ) | |

**MEMORANDUM DECISION**
**RE: ORDER TO SHOW CAUSE**

On September 5, 1995, Ibolya Rausch filed a Chapter 7[1] petition pro se. On her "Statement of Assistance by Non-Attorney", she disclosed that she had paid $150 to "Jack Ferm" for assistance in filing the petition. A "Statement of Assistance by Non-Attorney Re: Filing The Bankruptcy Petition" was signed by Ferm. It failed to state his Social Security Number ("SSN"). Instead, Ferm provided his SSN to the bankruptcy court's intake supervisor, and in the place provided for disclosure of the SSN, stated: "See Gail Intake Supervisor." Ferm did not place his SSN on the petition, the schedules, the statement of financial affairs, or the "Chapter 7 Individual Debtor's Statement of Intention." Ferm also failed to provide his name, address and signature on the schedules, the statement of financial affairs, and the "Chapter 7 Individual Debtor's Statement of Intention." Ferm also failed to provide his name, address and signature on the schedules, the statement of financial affairs, and the "Chapter 7 Individual Debtor's

[1] All Chapter, section and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

Statement of Intention."[2] Earlier, on August 30, 1995, this Court had entered an order denying Ferm's motion to use an identifying number other than his SSN on petitions prepared by him.

Upon a motion by the United States Trustee ("UST") this Court ordered Ferm to show cause why he (1) should not disgorge the fee paid to him by the Debtor; and (2) should not be fined for violation of 11 U.S.C. § 110(c); and (3) should not be held in contempt of the Court's August 30, 1995 order denying Ferm's motion to use an identifying number other than his SSN.

The UST argued in its show cause motion that Ferm failed to provide his SSN on 17 "documents",[3] that he failed to state his name and address on 15 "documents", and that failed to sign 16 "documents." The UST argues that each failure by Ferm to provide his name, address, signature and SSN constitutes a separate violation of 11 U.S.C. §§ 110(b)(1) and (c)(1). The UST asks that Ferm be fined $24,000 ($500 for each of the 48 "documents" filed), that he be required to disgorge his fee, and that he be found in contempt of the Court's order of August 30, 1995 denying Ferm's motion to use an identifying number other than his SSN.

Ferm argues that he has "reasonable cause" for not placing his SSN on the documents for filing, in that public disclosure of his SSN would leave him vulnerable to SSN-related fraud and "credit theft." He contends that disclosure of

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[2] Ferm did not provide his name, address and signature on a "Statement of Assistance by Non-Attorney Re: Filing The Bankruptcy Petition."

[3] The UST describes each of the following as a "document for filing" under 11 U.S.C. § 110: the petition, the summary of schedules, schedules A through J, the "Declaration Concerning Debtor's Schedules", the "Chapter 7 Individual Debtor's Statement of Intention", the "Statement of Financial Affairs", the "Statement of Assistance by Non-Attorney in Regards to Filing This Petition", and the "Statement of Assistance By Non-Attorney Re: Filing the Bankruptcy Petition."

his SSN to the bankruptcy court's intake supervisor satisfies 11 U.S.C. § 110(c), and that Congress cannot require him to make his SSN "known to the general public." Ferm challenges § 110(c)(2) on a number of constitutional grounds, arguing that it violates his fundamental rights "to choose a calling or profession", "to personal security" and his "right to privacy," the Fourth, Fifth and Ninth Amendments and the "penumbral guarantees." He contends that a heightened standard of review applies, in that public disclosure of his SSN isn't "necessary [for] a compelling government interest." Ferm also challenges § 110(c)(2) on equal protection grounds, arguing that it establishes a "class within a class" because attorneys and their employees are also "document preparers" but aren't required to supply their SSNs. Finally, Ferm argues that § 110(c)(2) violates the Privacy Act.

## Legal Discussion

### A. The Right To Privacy.

There is no "right of privacy" expressly guaranteed by the U.S. Constitution. Grummett v. Rushen, 779 F.2d 491 (9th Cir. 1985). The United States Supreme Court has recognized that "zones of privacy" may be created by specific constitutional guarantees which impose limits upon governmental power. Grummett, 779 F.2d at 491; Paul v. Davis, 424 U.S. 693, 712-13 (1976).

Rights found in the "zones of privacy" are limited to those which are "fundamental" or "implicit in the concept of ordered liberty." Roe v. Wade, 410 U.S. 113, 152 (1973) (citations omitted). The activities related to these "zones" pertain to the intimate facets of an individual's life in the areas of marriage, procreation, contraception, family relationships, child rearing and education. Paul v. Davis, 424 U.S. 693, 713 (1976). "The Supreme Court has limited the constitutional right to privacy to interferences with a 'person's most basic decisions about family and parenthood . . . as well as bodily

integrity.'" People of State of Calif. V. F.C.C., 75 F.3d 1350, 1361 (9th Cir. 1996), citing, Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992) (telephone number is not among the select privacy interests protected by a federal right to privacy).

The Ninth Circuit has held that the Constitution protects two types of privacy interests. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Doe v. Attorney Gen. of the United States, 941 F.2d 780, 795 (9th Cir. 1991), citing, Whalen v. Roe, 429 U.S. 589, 599 (1977).

Privacy interests which relate to disclosure of personal matters ("informational privacy") encompasses two area. The first in the government's collection and storing of information about citizens. See Whalen v. Roe, 429 U.S. 589, 605 (1977) (State recordation in a centralized computer file of the names and addresses of persons who have obtained certain drugs.) The second area is the release of information to the public or another government agency (the "public dissemination of information"). Nixon v. Adm'r of Gen. Serv., 433 U.S. 425 (1977) (disclosure of private papers concerning private communications between Nixon and his family and physician); Doe v. Attorney Gen. of United States, 941 F.2d 780 (9th Cir. 1991) (disclosure of medical information); United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3rd Cir. 1980) (disclosure of medical records). Ferm complains about the public disclosure of his SSN, and thus his arguments relate to the second area.

A SSN is no within one of the "zones of privacy" recognized as "fundamental" or "implicit in the concept of ordered liberty." In re Turner, 193 B.R. 548 (Bankr. N.D. Calif. 1996) (disclosure of SSN by document preparer does not violate preparer's constitutional right to privacy). A SSN has nothing to do with a person's most basic decisions about family, parenthood, or bodily integrity. "[M]andatory disclosure of "one's social security number does not so threaten the sanctity of individual privacy as to require

constitutional protection."[4] Doyle v. Wilson, 529 F. Supp. 1343, 1348 (D. Del. 1982). See also McElrath v. Califano, 615 F. 2d 434, 441 (7th Cir. 1980). Not every government disclosure of personal information invokes constitutional protection.[5] See, e.g., See People of State of Calif. v. F.C.C., 75 F.3d 1350, 1361 (9th Cir. 1996) (disclosure of telephone number is not protected by the federal constitution; it is "not among the select privacy interests protected by a federal constitutional right to privacy"), citing, Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992); St. Michael's Convalescent

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[4] The sources relied on by the Supreme Court or individual justices for a right of privacy have included the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350 (1967); Boyd v. United States, 116 U.S. 616, 630 (1886); the penumbra of the Bill of Rights, Griswold v. Connecticut, 381 U.S. 479, 484; and the Ninth Amendment, id. "These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy." Roe v. Wade, 410 U.S. 113, 152 (1973).

Ferm argues that there is a right to be free from "compulsion to make public a social security number" which stems from the Fourth Amendment's prohibition against unreasonable searches and seizures and the Fifth Amendment's "concerns for the right of each individual to a private enclave where he may lead a private life." While the Supreme Court has acknowledged that the involuntary disclosure of private information can implicate Fourth Amendment interests, Boyd v. United States, 116 U.S. 616 (1886); Davis v. United States, 328 U.S. 582, 587 (1946), it is unclear how § 110(c) compels disclosure. Ferm is under no compulsion to prepare documents for filing, and is free to refuse to do so. See, Wyman v. James, 400 U.S. 309, 317-18 (1971) (home visitation as a condition for financial assistance is not a Fourth Amendment violation). Furthermore, the Supreme Court has limited the scope of Fifth Amendment protection to compelled self-incrimination, not the disclosure of private information. Fisher v. United States, 425 U.S. 391, 401 (1976).

[5] The Supreme Court has indicated an unwillingness to find new, privacy-type fundamental rights. See Reno v. Flores, 507 U.S. 292 (1993) (Court refused to expand list of fundamental rights to include right of juveniles to be released into a noncustodial setting); Bowers v. Hardwick, 478 U.S. 186, 195 (1986) (advising against expanding the list of fundamental rights).

v. State of Calif., 643 F.2d 1369 (9th Cir. 1981) (health care provider's disclosure of cost information to public did not implicate a constitutional right of privacy).

Even where information involving a fundamental right is disclosed, however, privacy protection is not absolute. The right of privacy is "a conditional right which may be infringed upon a showing of proper governmental interest." Doe v. Attorney General of U.S., 941 F.2d 780, 796 (9th Cir. 1991). In determining whether the government may seek or use private information, courts balance the government's interest in having or using the information against the individual's interest in denying access. Id. The factors which must be considered in reaching a fair balance of the competing interests include (1) the type of information requested; (2) the potential for harm in any subsequent nonconsensual disclosure; (3) the adequacy of safeguards to prevent unauthorized disclosure; (4) the degree of need for access; and (5) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access. Id.

Apply these factors, overall, the balance weighs on the side of permitting the public disclosure of a document preparer's SSN under § 110. While there may be a risk that a SSN will be used fraudulently, the government's interest in policing widespread fraud and abuse by petition preparers outweighs the preparer's interest in denying public access to his SSN, and implicates no "fundamental" right.[6]

The need for public access to a document preparer's SSN is compelling, given the serious nature of the conduct to be prevented and the widespread corruption associated with document preparers. See In re Turner, 193 B.R. 548, 556 (Bankr. N.D. Calif. 1996) (government has compelling interest in disclosure of petition preparer's SSN in order to police fraud and abuse by preparers); Bowen v. Roy, 476 U.S. 693, 709 (1986) (prevention of fraud is compelling interest). Requiring

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[6] The right to pursue a calling or profession or not a fundamental right. Madarang v. Bermudes, 889 F.2d 251, 253 (9th Cir. 1989), cert. denied, 498 U.S. 814 (1990).

public disclosure of SSNs furthers the public interest by identifying unscrupulous preparers and by detecting and tracking their activities in the bankruptcy system. Alternatives to public disclosure are inadequate in that § 110(c) is not amenable to the kind of "private disclosure" sought by Ferm. Use of an alternative number such as a local driver's license number, or private disclosure of a *SSN* to court personnel, would be less effective for tracking the identities of petition preparers in the nationwide bankruptcy system.

Section 110(c) is an express statutory requirement that a petition preparer's SSN be placed upon the document prepared for filing. Section 110 (c) was enacted to "address the growing problem of bankruptcy preparers who abuse the system" and "is intended to police fraud and abuse by such preparers." S. Rep. No. 103d Cong., 1st Sess. 51 (1993). The legislative history describes § 110 as "critically needed to confront the large scale fraudulent conduct of (bankruptcy petition preparers) who prey on the poor and unsophisticated." 140 Cong. Rec. § 14, 597-98 (daily ed. October 7, 1994).

Congress has prohibited the disclosure of SSNs in select areas. For example, the use and disclosure of SSNs by state and federal agencies is limited by statute, pursuant to 42 U.S.C. § 405 (c) (2) (C). And 18 U.S.C. § 2721 prohibits a State department of motor vehicles from disclosing any personal information obtained by the department, which information includes a SSN under 18 U.S.C. § 2725 (3). The Internal Revenue Code, pursuant to 26 U.S.C. § 7431, allows for damage claims against the United States for disclosure of "return information" with respect to a taxpayer.[7] And under 5 U.S.C. § 552 (b) (6) (the Freedom of Information Act or "FOIA"), a government agency is permitted to withhold information in a personnel or medical file which would

[7] "Return information" includes a SSN under 26 U.S.C. § § 6103 (b) (2) and 6109 (d).

constitute a "clearly unwarranted invasion of personal privacy."[8]

Congress has chosen not to enact legislation which permits document preparers to use an alternative to the SSN, and this Court should not limit disclosure where the statute calls for none. "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" U.S. v. Ron Pair Enter., Inc., 489 U.S. 235, 241 (1989), citing, Caminetti v. United States, 242 U.S. 470, 485 (1917), cert. denied, 489 U.S. 235 (1979).

Ferm's argument that his failure to comply with § 110 is due to "reasonable cause" is not persuasive.[9] "Reasonable cause" to violate a statutory requirement has been found in cases where the violation is unavoidable through no fault of the violator. See, e.g.; United States v. Boyle, 469 U.S. 241, 243 n.1 (1985) (stating that the IRS has recognized that "reasonable cause" for untimely filing of tax return includes unavoidable postal delays, filing return at wrong office, serious illness of the taxpayer, etc.).

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[8] The FOIA does not apply in this case. There is no "agency" here which has been asked to disclose a "personnel" or "medical file." In the context of the FOIA, SSNs have been withheld from disclosure where the public interest in "knowing what their government is up to" is outweighed by the privacy interest that would be harmed. See Painting Indus. Of Hawaii v. Dept. of Air Force, 26 F. 3d 1479 (9th Cir. 1994) (payroll information containing name, address, SSN, and rate of pay redacted where employee's privacy interests were not outweighed by public's interest); Int'l Bhd of Elec. Workers Local Union No. 5 v. United States Dept. of Housing and Urban Dev., 852 F. 2d 87, 89 (3rd Cir. 1988) (release of SSN was unwarranted invasion of privacy where there was no countervailing public interest in disclosure). Compare, Dobronski v. F.C.C., 17 F. 3d 275 (9th Cir. 1994) (sick leave slips which contained SSN were properly disclosed to public, where public interest in uncovering alleged abuse of public monies outweighed the "minimal" privacy interests involved).

[9] Section 110 provides for fines against a petition preparer who fails to place his name, address, signature, and SSN on a "document for filing" unless the failure is due to "reasonable cause." "Reasonable cause" is not defined in the Code.

Here, Ferm's failure to comply with § 110 is not unavoidable through no fault of Ferm's. Instead, his failure to comply with § 110 is willful, in that it is based upon his stated belief that placing his *SSN* on documents leaves him vulnerable to SSN-related fraud. Congress has provided protection in this area, in that 42 U.S.C. § 408 (a) (7) (B) makes it a crime to use another' *s SSN* with the intent to deceive.

Whether or not a right is "fundamental" determines the appropriate level of constitutional scrutiny in determining whether a statute infringes upon that right. If the statute significantly infringes upon a fundamental right, the justifications for the statute are strictly scrutinized. Zablocki v. Redhail, 434 U.S. 374, 383 (1978); Munoz v. Sullivan, 930 F.2d 1400, 1404 (9th Cir. 1991). Otherwise, a statute is analyzed under the highly deferential "rational basis" standard of review applicable to most economic and social legislation. See Williamson v. Lee Optical, Inc., 348 U.S. 483, 486-88 (1955). Under that standard, the statute is constitutional if it bears a rational relationship to a legitimate state interest. Jackson Water Works, Inc. v. Public Utilities Comm'n of State of California, 793 F.2d 1090, 1093-94 (9th Cir. 1986) , cert. denied, 479 U.S. 1102 (1987) . The party challenging the statute has the burden of proving that it is unconstitutional. Jackson, 793 F.2d at 1094. See also, Jones v. Reagan, 748 F.2d 1331 (9th Cir. 1984) (legislation is presumed to be rational), cert. denied, 472 U.S. 1029 (1985).

Between these two extremes, an intermediate level of scrutiny applies when a right impinged is important though not protected by the Constitution. See generally, City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-42 (1985). Intermediate scrutiny is used to determine the validity of laws that classify according to gender and other criteria. See, e.g., Craig v. Boren, 429 U.S. 190 (1976) (gender); Plyler v. Doe, 457 U. S. 202 (1982) (alienage); Lalli v. Lalli, 439 U.S. 259 (1978) (illegitimacy). A law will be struck down under intermediate scrutiny unless it can be shown that it is

substantially related to an important government purpose. Stop H-3 Ass'n v. Dole, 870 F.2d 1419 1429 n. 20 (9th Cir. 1989).

The public disclosure of a SSN does not involve a "fundamental" right, and thus strict scrutiny does not apply.[10] None of the constitutional guarantees of privacy in the recognized "zones of interest" bear any resemblance to the claimed constitutional right not to publicly disclose one's SSN. Ferm has argued no connection between family, marriage, procreation or bodily integrity on the one hand and disclosure of a SSN on the other.

An intermediate level of scrutiny has been applied in cases involving financial disclosure laws. Court have held that such laws which require officials and candidates for office to publicly disclose their assets, liabilities and other personal financial information implicate privacy concerns. See, e.g., Barry v. City of New York, 712 F.2d 1554 (2d Cir. 1983); Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), cert. denied, 439 U. S. 1129 (1979) . The majority of those courts have applied an intermediate level of scrutiny when such laws have been challenged. Barry, 712 F.2d at 1559.

Unlike financial disclosure laws, the disclosure of a SSN directly reveals nothing personal or private about its

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[10] The Ninth Circuit, in the "informational privacy" cases of Doe v. Attorney Gen. of the United States, 941 F.2d 780, 797, 796 (9th Cir. 1991) and Thorne v. City of El Segundo, 726 F.2d 459, 469-71 (9th Cir. 1991) , cert. denied, 469 U.S. 979 (1984), applied a strict standard of review, holding that the government may seek and use information if it can show that its use would "advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." Doe v. Attorney General of the United States, 941 F.2d 780, 796 (9th Cir. 1991) . "The more sensitive the information, the stronger the state's interest must be." Id. at 796. Arguably, the stricter standard of review was applied in Doe and in Thorne because of the nature of the interests at issue - the disclosure of medical information in Doe, 941 F.2d at 795, and "the core of rights protected by the constitution's guarantees of privacy and free association - apellant's interest in family living arrangements, recreation and marriage" in Thorne, 726 F.2d at 469.

holder. Any disclosure of financial information is only potential, and can come about only through additional acts.

An intermediate level of scrutiny is only employed when "concerns sufficiently absolute and enduring can be clearly ascertained from Constitution and Supreme Court cases." Stop H- 3 Ass'n v. Dole, 870 F.2d 1419, 1430 (9th Cir. 1989), quoting Plyler v. Doe, 457 U.S. at 218 n. 16. While disclosure of a SSN could leave an individual at some risk of injury due to the unauthorized use of the number,[11] this Court does not have decide whether the public disclosure of a SSN entitles document preparers to something more than the minimal "rational basis" scrutiny. Even assuming, arguendo, that a purported right not to disclose a SSN is an important right giving rise to intermediate level of review, § 110 (c) satisfies the requirements for that level of scrutiny.

Congress explained that the purpose of § 110 (c) is to police fraud and abuse by petition preparers, and that it is "critically needed" to confront the large scale fraudulent conduct of those preparers "who prey on the poor and unsophisticated." 140 Cong. Rec. § 14, 597-98 (daily ed. October 7, 1995) . Section 110 is substantially and directly related to the achievement of Congress' objective. The public disclosure of a document preparer's SSN is a legitimate means of furthering that objective in that it significantly helps the public identify unscrupulous preparers, and serves to deter and track their activities. The private disclosure of a SSN to court personnel would not assist the public in identifying unscrupulous document preparers.

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[11] The sensitive nature of one' *s* SSN has been recognized in Greidinger v. Davis, 988 F. 2d 1344, 1354 (4th Cir. 1993) , which stated that "the harm that can be inflicted from the disclosure of a SSN to an unscrupulous individual is alarming and potentially ruinous." In Greidinger, a Virginia voter registration scheme required voters to supply their SSNs and permitted the voter list to be sold. The court held that the disclosure of a SSN created an intolerable burden on the fundamental right to vote. Unlike Greidinger, there is no fundamental right implicated in the case at bar.

Because § 110 would survive the intermediate level of scrutiny, it would a fortiorari be upheld under a "rational basis" review. Section 110 (c) serves a legitimate governmental purpose, and is rationally related to the achievement of that purpose.

Accordingly, § 110 (c) does not unconstitutionally invade Ferm's right of privacy. It serves a legitimate and important government purpose and is rationally and substantially related to the achievement of that purpose. Furthermore, the government's interest in disclosing the SSN outweighs Ferm's interest in denying such disclosure.

B. Equal Protection.

Ferm contends that § 110 (c) violates the equal protection clause. He argues that petition preparers are similarly situated to attorneys and their employees, and that § 110 impermissibly discriminates against members of the same class."

The Due Process Clause of the Fifth Amendment, which is applicable to the federal government, incorporates the Fourteenth Amendment's right to equal protection. United States v. Lopez-Flores, 63 F.3d 1468, 1472 (9th Cir. 1995), cert. denied, 116 S. Ct. 794 (1996) . Analysis of an equal protection claim alleging an improper statutory classification involves two steps. First, there must be a showing that the statute, either on its face or in the manner of its enforcement, results in members of a certain group being treated differently from other persons based on membership in that group. Id. Ferm has established that element. Second, if it is demonstrated that a cognizable class is treated differently, the court must analyze under the appropriate level of scrutiny whether the distinction made between the groups is justified. Id.

When the government utilizes a "suspect or quasi-suspect" classification or draws distinctions among individuals that bear on the exercise of a fundamental right, the challenged

statute will be subject to heightened scrutiny. Munoz v. Sullivan, 930 F.2d 1400, 1404 (9th Cir. 1991). Otherwise, the distinctions that the government draws among persons need only be rationally related to a legitimate governmental purpose. Id. Unless a statute employs a classification that is inherently invidious (such as race or gender), or that impinges on fundamental rights, the court exercises only limited review. Navarro v. Block, 72 F.2d 712, 717 (9th Cir. 1995). Under the rational basis test, the burden of proof is on the party who is attempting to disprove the existence of a rational relationship between a statutory classification and a government objective. McQueary v. Blodgett, 924 F.2d 829 (9th Cir. 1991).

There is no fundamental right not to publicly disclose a SSN. Nor is there any allegation that § 110 (c) targets document preparers on the basis of any "suspect or quasi-suspect" classification. Thus, Ferm can state an equal protection challenge only if there is no legitimate grounds to support the classification.

The distinction between bankruptcy petition preparers and attorneys and their employees is neither arbitrary nor irrational. Attorneys are subject to malpractice actions, rules of ethical conduct, disciplinary proceedings and continuing legal education requirements. Bankruptcy petition preparers are not. Attorneys are also held responsible for their employees, such as secretaries, law clerks, and other assistants. The government has a legitimate interest in the Prevention of fraud perpetrated on the public by petition preparers. Requiring public disclosure of a petition preparer's SSN on the documents which they prepare is rationally related to that purpose. Thus, § 110 (c) does not violate the Equal Protection Clause. Because the legislative classification here is supported by a rational basis, Ferm's equal protection challenge fails. See Chambers v. Klein, 419 F. Supp. 569, 583-84 (D. N.J. 1976) (SSNs only required for children whose parents received federal aid, and not from other children whose parents did not receive aid, did not violate the equal protection clause), aff'd, 564 F.2d 89 (3rd Cir. 1977). For the reasons discussed above,

even if an intermediate level of scrutiny was applicable, § 110 (c) serves an important governmental purpose in policing fraud and abuse by document preparers. Section 110 is substantially related to the achievement of that purpose, in that public disclosure of a document preparer's SSN helps the public identify unscrupulous preparers, and serves to deter and track their activities.

C. Privacy Act.

Disclosure of social security numbers is the subject of Section 7 of the Privacy Act of 1974, Public Law 93-579 ("Privacy Act"), which states that a government agency may not lawfully deprive any individual of a legal right, benefit or privilege because of such person's refusal to disclose his or her social security number.[12] Section 7 does not apply to "any disclosure which is required by Federal statute." Privacy Act § 7 (a) (2) (A). Given that 11 U.S.C. § 110 is a federal statute which requires placing the SSN upon "documents for filing", the Privacy Act is inapplicable here.

D. Penalty.

The fines provided for in § 110 apply to any "document for filing" prepared by a petition preparer. The UST argues that the summary of schedules, the declaration concerning debtor's schedules, and each schedule (A - J) is a separate "document for filing." Each relevant Advisory Committee Note to the 1995 amendment to the Official Forms state, however, that the schedules, the statement of financial affairs, and the "Chapter 7 Individual Debtor's Statement of Intention" are each a "document for filing." A petition is also a "document for filing" requiring a preparer's name, address, signature and SSN. See Advisory Committee Note to Official Form 1.

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[12] Section 7 is an uncodified statute-at-large, which is found in the note to 5 U.S.C. § 552 (a) (1977).

Indeed, the Official Forms for the petition, the schedules, the statement of financial affairs, and the statement of intention have specific sections which provide space for the disclosure of the petition preparer's name, address, signature, and SSN.[13]

Accordingly, Ferm shall be fined $200 for each "document for filing" in violation of § 110 (b) (1) which does not contain his name, address, and signature ($600).[14] Furthermore, Ferm shall be fined $100 for violation of § 110 (c) (1) for each "document for filing" that does not have his *SSN* ($400).[15]

Ferm's total fine is $1,000, which shall be payable to Patricia Gray, Clerk of the Bankruptcy Court, Foley Federal Courthouse, 300 Las Vegas Boulevard South, Las Vegas, Nevada 89101, within sixty (60) days of the entry of this Order.

The UST's request that Ferm be ordered to disgorge his fee is denied, given that the UST presented no evidence that the fee was in excess of the value of the services provided. Furthermore, the UST's request that Ferm be found in contempt is denied, given that the prior order of August 30, 1995 prohibited Ferm from using an alternative number, and did not prohibit him from supplying his SSN to the intake supervisor only.

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[13] Pursuant to Fed. R. Bankr. P. 1007, a Chapter 7 debtor must file the schedules, statement of financial affairs and statement of intent "as prescribed by the appropriate Official Forms." Ferm has not filed the Official Forms.

[14] Ferm signed and placed his name and address on the "Statement of Assistance By Non-Attorney Re: Filing The Bankruptcy Petition." Ferm failed to sign and place his name and address on the schedules, the statement of financial affairs, or the "Chapter 7 individual Debtor's Statement of Intention."

[15] Ferm failed to place his SSN on the petition, the schedules, the statement of financial affairs, and the "Chapter 7 Individual Debtor's Statement of Intention."

IT IS SO ORDERED.

Dated this 20th day of May, 1996.

/s/ .
LINDA B. RIEGLE
United States Bankruptcy Judge

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

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| In re<br>LAORPHUS CRAWFORD,<br>Debtor | CV-S-96-0647-PMP (LRL)<br>BK-S-95-23839-RCJ |
| JACK FERM,<br>Appellant,<br>v.<br><br>U.S. TRUSTEE,<br>Appellee. | Appeal Ref 96-16<br><br>**OPINION** |

Appellant Jack Ferm ("Ferm") appeals the Memorandum Decision Regarding Order to Show Cause entered by the United States Bankruptcy Court (D. Nev.) on May 20, 1996. In that Decision, the court fined Ferm $1,000 for violations of 11 U.S.C. § 110 (b) (1) and § 110 (c) (1), which require that bankruptcy petition preparers place their name, address, signature and social security number ("SSN") on documents they prepare for filing with the bankruptcy court. The bankruptcy court fined Ferm for failing to place his name, address, signature and SSN on several documents filed with the court.

On June 24, 1996, Ferm, filing pro se, filed a Notice of Election to Transfer the Appeal to the District Court Pursuant to 28 U.S.C. 158 (c) (1). Ferm filed his Opening Brief on April 16, 1997 (#43). On May 30, 1997, the United States Trustee filed its Opening Brief (#45), and on June 23, 1997, Ferm filed his Reply (#47).

## I. Standard of Review

The Bankruptcy court's findings of fact shall not be set aside by a reviewing court unless those findings are clearly erroneous. In re Canland, 90 F. 3d 1466, 1469, (9th Cir. 1996). Conclusions of law are reviewed de novo. Havelock v. Taxel (In re Pace), 67 F. 3d 187, 191 (9th Cir. 1995). As there is no dispute as to the facts in the present case, and Ferm's appeal involves only questions of law, the proper standard of review is de novo.

## II. Discussion

Ferm contends that 11 U.S.C. § 110 (c) is unconstitutional in three ways: 1) that section 110 (c) violates the fundamental right to privacy in his SSN; 2) that the statute violates equal protection; and 3) that section 110 (c) violates Ferm's fundamental right to engage in his chosen occupation. Ferm also contends that the statute violates the Privacy Act of 1974, and that reasonable cause existed to excuse his noncompliance with the statute's requirements.

### A. Ferm's Privacy Interest is His SSN

Ferm contends that he has a fundamental right to privacy in his SSN, and that the government cannot force him to disclose his SSN in the absence of a compelling governmental interest. In analyzing this issue, this Court must first examine whether Ferm has a fundamental privacy right at stake, and whether 11 U.S.C. § 110 (c) interferes with that right. Once this is shown, a court, utilizing strict scrutiny, must determine if the statute is narrowly tailored to serve a compelling state interest. Washington v. Glucksberg, __ U.S. __, __ S. Ct. __, 1997 WL 348094, 65 U.S.L.W. 4669 (U.S. June 26, 1997).

Ferm has offered no authority supporting his proposition that privacy in an individual's SSN is a

fundamental right.[1] Ferm cites Greidinger v. Davis, 988 F. 2d 1344 (4th Cir. 1993), in support, but Greidinger is not dispositive. In Greidinger, the court addressed a law requiring that individuals registering to vote disclose their SSNs. The court found that this was an impermissible restriction on the fundamental right to vote, not that privacy in one's SSN was fundamental. Id. At 1348. In fact, the Supreme court has limited fundamental privacy rights to those deemed "fundamental or implicit in the concept of ordered liberty." Roe v. Wade, 410 U.S. 113, 152 (1973). Such privacy rights normally relate to things such as marriage, procreation, and family relationships. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

Courts addressing the issue of privacy and SSNs have found that there is no fundamental privacy right prohibiting disclosure. Doyle v. Wilson, 529 F. Supp. 1343, 1348 (D. Del. 1992); McElrath v. Califano, 615 F. 2d 434, 441 (7th Cir. 1980). As the right is not fundamental, the statute must only be rationally related to the government interest at issue. Washington, 1997 WL 348094 at 12. In the present case, Congress enacted 11 U.S.C. § 110 (c) as a consumer protection measure to police fraud and abuse by bankruptcy petition preparers. Marshall v. Bourque (In re Hartman), 208 B.R. 768, 776 (Bankr. D. Mass. 1997). The purpose behind the law was to identify petition preparers and protect debtors from preparers who lacked legal training and ethics regulation, and to protect them from those who may take unfair advantage of debtors unfamiliar with the bankruptcy system. In re Hartman, 208 B.R. at 776, (quoting H.R. Rep. No. 835, 103rd Cong., 2nd Sess. 40-41 (1994)).

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[1] The cases cited by Ferm deal with the scope of privacy issues under the Freedom of Information Act, 5 U.S.C. § 552, and not the constitutional parameters of the right of privacy. See, e.g., Painting Indus. Of Hawaii Mkt. Recovery Fund v. United States Dep't of the Air Force, 26 F. 3d 1479 (9th Cir. 1994); Minnis v. United States Dep't of Agric., 737 F. 2d 784, 787 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985).

Requiring bankruptcy petition preparers to list their name, address, signature and SSN is clearly rationally related to the legitimate governmental interest of protecting debtors filing with the bankruptcy court from negligence and fraud. While Ferm may be correct that it is not the best or ideal way to promote the government's interest, rational basis analysis does require that the method of regulation be narrowly tailored. It may be that private disclosure of Ferm's SSN to only the bankruptcy court, to which he does not object, would be the preferable method of regulation. However, it is not this Court's role to second-guess legislative enactments, and this Court may invalidate such an act of Congress only if it is impermissible according to settled constitutional analysis. Since Ferm has failed to show such a constitutional violation, 11 U.S.C. § 110(c) was properly applied to his actions.

B. Equal Protection

Under Equal Protection Clause analysis, a law which treats different groups in a different manner must only be rationally related to a legitimate state interest unless it affects a fundamental right or discriminates based on a suspect or quasi-suspect classification. Munoz v. Sullivan, 930 F.2d 1400, 1404 (9th Cir. 1991). As discussed above, there is no fundamental right to privacy in one's SSN. The Ninth Circuit has also held that the right to pursue a calling is not a fundamental right for purposes of the Equal Protection Clause. Country Classic Dairies v. Milk Control Bureau, 847 F.2d 593, 596 (9th Cir. 1988). Therefore, 11 U.S.C. § 110(c) is constitutional if it is rationally related to a legitimate state interest. See Madarang v. Bermudes, 889 F.2d 251, 253 (9th Cir.) cert. denied, 498 U.S. 814 (1990). As discussed above, 11 U.S.C. § 110(c) is rationally related to the legitimate state interest of protecting debtors filing in bankruptcy court. Thus, Ferm can prevail under an Equal Protection Clause analysis only if he proves that 11 U.S.C. 110(c) is based on a suspect or quasi-suspect classification.

Section 110(a)(1) classifies those who file bankruptcy petitions into two separate groups: attorneys and their employees, and non-attorneys. The United States Trustee, in its brief, points out the difference between attorneys and non-attorneys in this context. Attorneys are readily identifiable through their bar numbers, they must graduate from law school, they must pass bar and professional responsibility exams, they are subject to discipline by the bar and they must meet continuing legal education requirements. They also are subject to lawsuits for malpractice for negligent or intentional misconduct. Attorneys' employees are subject to an attorney's supervision, and the attorney employer is ultimately responsible for their employees' actions.

The distinction between attorneys and non-attorneys for purposes of sectoin 110(c) is not a suspect nor quasi-suspect classification. Suspect classifications are those such as race and nationality while quasi-suspect classifications are those such as gender. Benson v. Arizona State Bd. Of Dental Exam'rs, 673 F.2d 272, 277 n. 15 (9th Cir. 1982). Since there is no basis for heightened security under the Equal Protection Clause and section 110(c) passes the rational basis test, Ferm's argument that the statute is unconstitutional fails.

C. Substantive Due Process

Ferm asserts that he a fundamental right to work in the employment of his choice, and that section 110(c) unconstitutionally burdens that right. While the right to engage in an occupation is an important right that cannot be denied without due process under the Fifth Amendment, it is not a fundamental right. See Country Classic, 847 F.2d at 596.

If a statute does not impinge on a fundamental right, the government must merely show that the statute at issue serves a legitimate governmental reason. Madarang, 889 F.2d at 253. Ferm must show that the governmental regulations are arbitrary and unreasonable, and that they have no relation to legitimate governmental concerns such as public health, safety

or general welfare. See Wedges/Ledges of California v. City of Phoenix, 24 F.3d 56, 65 (9th Cir. 1994). As articulated above, there is a rational basis for the connection between concerns about protecting those who utilize the bankruptcy system and section 110(c). Additionally, section 110(c) contains procedural mechanisms such as a hearing before the imposition of any remedies. Thus, section 110(c) is constitutional under *both* a substantive and due process analysis.

D. The Privacy Act of 1974

Ferm presents, without discussion, that there is an issue for this Court of whether 11 U.S.C. 110 (c)(2) & (3) conflicts with 5 U.S.C. 552a. Section 552a of 5 U.S.C. is known as The Privacy Act, and it regulates the use and dissemination of records contained in a system of records by any agency. However, the definition of an agency in 11 U.S.C. § 552a(a)(1) specifically excepts the courts of the United States from its coverage. The Privacy Act also creates an exception for disclosures required by federal law. Privacy Act of 1974, Pub. L. No. 93-579 § 7(a)(2)(A). Therefore, there is no conflict warranting a reversal of the bankruptcy court's decision.

E. Reasonable Cause to violate § 110(c)

Section 110(c)(3) provides that "reasonable cause" may excuse noncompliance for the statute's requirements. Ferm contends that his personal security concerns that unauthorized person may obtain his SSN and utilize it fraudulently excuses his failure to comply with section 110(c). "Reasonable cause" is not defined anywhere in section 110(c)(3). However, courts have held that reasonable cause to violate a statutory requirement exists where the violation is unavoidable through no fault of the violator. United States Trustee v. Womack (In re Paskell), 201 B.R. 511, 518 (Bankr.

E.D. Ark. 1996). Where a violation of the statute is purposeful, it is not an excuse for violating the Bankruptcy Code. Id. Here Ferm's noncompliance was intentional, as he clearly had the ability to comply with the statute, but chose to deliberately violate section 110(c). Such a situtation does not constitute "reasonable cause," and while Ferm's security concerns are clearly justified, they are insufficient to constitute reasonable cause. If these concerns justified noncompliance, every bankruptcy petition preparer would have reasonable cause to violate the statute, which would render the statute entirely ineffective. This Court cannot find that such a meaningless result was the true Congressional intent behind section 110(c).

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IT IS THEREFORE ORDERED THAT the Bankruptcy Court's Memorandum Decision Regarding Order to Show Cause is hereby AFFIRMED.

DATED: July 30, 1997

/s/

PHILIP M. PRO
United States District Judge

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

| | |
|---|---|
| In re<br>IBOLYA RAUSCH,<br>Debtor | CV-S-96-0646-PMP (LRL)<br>BK-S-95-23707-LBR |
| | Appeal Ref 96-15 |
| JACK FERM,<br>Appellant,<br>v.<br><br>U.S. TRUSTEE,<br>Appellee. | **OPINION** |

Appellant Jack Ferm ("Ferm") appeals the Memorandum Decision Regarding Order to Show Cause entered by the United States Bankruptcy Court (D. Nev.) on May 20, 1996. In that Decision, the court fined Ferm $1,000 for violations of 11 U.S.C. § 110 (b) (1) and § 110 (c) (1), which require that bankruptcy petition preparers place their name, address, signature and social security number ("SSN") on documents they prepare for filing with the bankruptcy court. The bankruptcy court fined Ferm for failing to place his name, address, signature and SSN on several documents filed with the court.

On June 24, 1996, Ferm, filing pro se, filed a Notice of Election to Transfer the Appeal to the District Court Pursuant to 28 U.S.C. 158 (c) (1). Ferm filed his Opening Brief on April 16, 1997 (#43). On May 30, 1997, the United States Trustee filed its Opening Brief (#45), and on June 23, 1997, Ferm filed his Reply (#47).

## I. Standard of Review

The Bankruptcy court's findings of fact shall not be set aside by a reviewing court unless those findings are clearly erroneous. In re Canland, 90 F. 3d 1466, 1469, (9th Cir. 1996). Conclusions of law are reviewed de novo. Havelock v. Taxel (In re Pace), 67 F. 3d 187, 191 (9th Cir. 1995). As there is no dispute as to the facts in the present case, and Ferm's appeal involves only questions of law, the proper standard of review is de novo.

## II. Discussion

Ferm contends that 11 U.S.C. § 110 (c) is unconstitutional in three ways: 1) that section 110 (c) violates the fundamental right to privacy in his SSN; 2) that the statute violates equal protection; and 3) that section 110 (c) violates Ferm's fundamental right to engage in his chosen occupation. Ferm also contends that the statute violates the Privacy Act of 1974, and that reasonable cause existed to excuse his noncompliance with the statute's requirements.

### A. Ferm's Privacy Interest is His SSN

Ferm contends that he has a fundamental right to privacy in his SSN, and that the government cannot force him to disclose his SSN in the absence of a compelling governmental interest. In analyzing this issue, this Court must first examine whether Ferm has a fundamental privacy right at stake, and whether 11 U.S.C. § 110 (c) interferes with that right. Once this is shown, a court, utilizing strict scrutiny, must determine if the statute is narrowly tailored to serve a compelling state interest. Washington v. Glucksberg, __ U.S. __, __ S. Ct. __, 1997 WL 348094, 65 U.S.L.W. 4669 (U.S. June 26, 1997).

Ferm has offered no authority supporting his proposition that privacy in an individual's SSN is a

fundamental right.[2] Ferm cites Greidinger v. Davis, 988 F. 2d 1344 (4th Cir. 1993), in support, but Greidinger is not dispositive. In Greidinger, the court addressed a law requiring that individuals registering to vote disclose their SSNs. The court found that this was an impermissible restriction on the fundamental right to vote, not that privacy in one's SSN was fundamental. Id. At 1348. In fact, the Supreme court has limited fundamental privacy rights to those deemed "fundamental or implicit in the concept of ordered liberty." Roe v. Wade, 410 U.S. 113, 152 (1973). Such privacy rights normally relate to things such as marriage, procreation, and family relationships. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

Courts addressing the issue of privacy and SSNs have found that there is no fundamental privacy right prohibiting disclosure. Doyle v. Wilson, 529 F. Supp. 1343, 1348 (D. Del. 1992); McElrath v. Califano, 615 F. 2d 434, 441 (7th Cir. 1980). As the right is not fundamental, the statute must only be rationally related to the government interest at issue. Washington, 1997 WL 348094 at 12. In the present case, Congress enacted 11 U.S.C. § 110 (c) as a consumer protection measure to police fraud and abuse by bankruptcy petition preparers. Marshall v. Bourque (In re Hartman), 208 B.R. 768, 776 (Bankr. D. Mass. 1997). The purpose behind the law was to identify petition preparers and protect debtors from preparers who lacked legal training and ethics regulation, and to protect them from those who may take unfair advantage of debtors unfamiliar with the bankruptcy system. In re Hartman, 208 B.R. at 776, (quoting H.R. Rep. No. 835, 103rd Cong., 2nd Sess. 40-41 (1994)).

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[2] The cases cited by Ferm deal with the scope of privacy issues under the Freedom of Information Act, 5 U.S.C. § 552, and not the constitutional parameters of the right of privacy. See, e.g., Painting Indus. Of Hawaii Mkt. Recovery Fund v. United States Dep't of the Air Force, 26 F. 3d 1479 (9th Cir. 1994); Minnis v. United States Dep't of Agric., 737 F. 2d 784, 787 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985).

Requiring bankruptcy petition preparers to list their name, address, signature and SSN is clearly rationally related to the legitimate governmental interest of protecting debtors filing with the bankruptcy court from negligence and fraud. While Ferm may be correct that it is not the best or ideal way to promote the government's interest, rational basis analysis does require that the method of regulation be narrowly tailored. It may be that private disclosure of Ferm's SSN to only the bankruptcy court, to which he does not object, would be the preferable method of regulation. However, it is not this Court's role to second-guess legislative enactments, and this Court may invalidate such an act of Congress only if it is impermissible according to settled constitutional analysis. Since Ferm has failed to show such a constitutional violation, 11 U.S.C. § 110(c) was properly applied to his actions.

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Under Equal Protection Clause analysis, a law which treats different groups in a different manner must only be rationally related to a legitimate state interest unless it affects a fundamental right or discriminates based on a suspect or quasi-suspect classification. Munoz v. Sullivan, 930 F.2d 1400, 1404 (9th Cir. 1991). As discussed above, there is no fundamental right to privacy in one's SSN. The Ninth Circuit has also held that the right to pursue a calling is not a fundamental right for purposes of the Equal Protection Clause. Country Classic Dairies v. Milk Control Bureau, 847 F.2d 593, 596 (9th Cir. 1988). Therefore, 11 U.S.C. § 110(c) is constitutional if it is rationally related to a legitimate state interest. See Madarang v. Bermudes, 889 F.2d 251, 253 (9th Cir.) cert. denied, 498 U.S. 814 (1990). As discussed above, 11 U.S.C. § 110(c) is rationally related to the legitimate state interest of protecting debtors filing in bankruptcy court. Thus, Ferm can prevail under an Equal Protection Clause analysis only if he proves that 11 U.S.C. 110(c) is based on a suspect or quasi-suspect classification.

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E.D. Ark. 1996). Where a violation of the statute is purposeful, it is not an excuse for violating the Bankruptcy Code. Id. Here Ferm's noncompliance was intentional, as he clearly had the ability to comply with the statute, but chose to deliberately violate section 110(c). Such a situtation does not constitute "reasonable cause," and while Ferm's security concerns are clearly justified, they are insufficient to constitute reasonable cause. If these concerns justified noncompliance, every bankruptcy petition preparer would have reasonable cause to violate the statute, which would render the statute entirely ineffective. This Court cannot find that such a meaningless result was the true Congressional intent behind section 110(c).

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IT IS THEREFORE ORDERED THAT the Bankruptcy Court's Memorandum Decision Regarding Order to Show Cause is hereby AFFIRMED.

DATED: July 30, 1997

/s/ .
PHILIP M. PRO
United States District Judge

**United States Circuit Court of Appeals**

**FOR THE NINTH CIRCUIT**

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**FERM v US TRUSTEE**
**No. 9716646**

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In re: LAORPHUS CRAWFORD,
Debtor.
No. 97-16646
JACK FERM,
D.C. No.
CV-96-00647-PMP(LRL)
Appellant,

v.

UNITED STATES TRUSTEE,
Appellee.

In re: IBOLYA RAUSCH,
Debtor.
No. 97-16653

JACK FERM,
D.C. No.
CV-96-00646-PMP(RLH)
Appellant,

v.

UNITED STATES TRUSTEE,
Appellee.

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**OPINION**

Appeals from the United States District Court

for the District of Nevada

Philip M. Pro, District Judge, Presiding

Argued and Submitted

February 8, 1999--San Francisco, California

Filed October 7, 1999
Before: Betty B. Fletcher, and A. Wallace Tashima,
Circuit Judges, and James R. Singleton,* District Judge.

Opinion by Judge B. Fletcher

The bankruptcy court fined Ferm $800. The district court affirmed.

Ferm appealed, contending that S 110(c) violated his constitutional rights to equal protection and privacy, as well as certain rights secured to him by S 7 of the Privacy Act. Alternatively, Ferm asserted that he satisfied the requirements of the "reasonable cause" exception to S 110(c).

[1] The existence of the constitutional "zone of privacy" is well established. Supreme Court precedents delineate at least two constitutionally protected privacy interests: the individual interest in avoiding disclosure of personal matters, and the interest in independence in making certain kinds of important decisions. Ferm argued that disclosure of his SSN implicated the right of "informational privacy."

[2] Indiscriminate public access of SSNs, especially when accompanied by names and addresses, may implicate the constitutional right to informational privacy. The harm that can be inflicted from the disclosure of an SSN to an unscrupulous

individual is potentially financially ruinous. Unlike a telephone number or a name, an individual's SSN serves as a unique identifier that cannot be changed, and is generally not disclosed by individuals to the public.

[3] Judicial and legislative actions also support the conclusion that the disclosure of SSNs can raise serious privacy concerns. Courts have interpreted the Freedom of Information Act to forbid disclosure of SSNs. Congress has enacted measures to control the collection and dissemination of SSNs by government agencies, including the Privacy Act and the Driver Privacy Act.

[4] However, the right to informational privacy is not absolute. Rather, it is a conditional right that may be infringed on a showing of a proper governmental interest. To determine whether the government may disclose private information, courts engage in weighing competing interests. The government has the burden of showing that its use of the information would advance a legitimate state interest, and that its actions are narrowly tailored to meet the interest. In most cases, it will be the overall context that will dictate the tipping of the scales.

[5] Properly understood, Ferm's complaint was that disclosure of his SSN made him vulnerable to being a victim of certain crimes. While this implicated Ferm's informational privacy interests, it did not appear to constitute a more serious invasion of those interests than many other requirements imposed by government. To weigh properly the privacy interest involved, the dire consequences of identity theft must be discounted by the probability of its occurrence. Government disclosure enhances the risk of identity theft. However, realization of the injury requires two nongovernmental interests: an identity thief and a vulnerable account.

[6] Section 110 was enacted to remedy what was perceived to be widespread fraud and unauthorized practice of law in the BPP industry. This constitutes an important governmental interest. Moreover, gathering BPP SSNs serves this interest by facilitating governmental monitoring and policing of individual BPPs.

[7] Along with the rest of the documents filed with the bankruptcy court, the disclosure of SSNs serves the important purposes behind the Bankruptcy Code's "public access" provision, S 107(a). This governmental interest is of special importance in bankruptcy, as unrestricted access to judicial records fosters confidence among creditors regarding the fairness of the system. Section 107 is not impermissibly overbroad when balanced against the speculative harms identified by Ferm.

[8] The speculative possibility of identity theft is not enough to trump the importance of the governmental interests behind S 110 and S 107. The balance tipped in the government's favor. Accordingly, it could not be said that Congress transgressed the bounds of the Constitution in enacting the statutes.

[9] Ferm conceded that S 110(c) does not burden a suspect or quasi-suspect class or a fundamental right, and that equal protection therefore demands only that the statutory classification be rationally related to a legitimate governmental interest.

[10] Disclosure of SSNs pursuant to S 107 is rationally related to the legitimate governmental interest in facilitating public access to the courts. This was enough to defeat Ferm's equal protection argument.

[11] While pursuit of a profession has been recognized as a protected liberty interest, a restriction on the conduct of a profession will run afoul of substantive due process rights only

if it is irrational. To prevail, Ferm had to establish that S 110(c) is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. Ferm failed to satisfy this exacting standard.

[12] Section 7(b) of the Privacy Act includes a provision meant to control the collection and dissemination of SSNs by government agencies.

[13] Ferm conceded that he had no objection to the collection of his SSN, and thus waived any objection stemming from the method of collection employed by the government. Section 7(b) has no bearing on public disclosure of SSNs by the government.

[14] Whether or not "reasonable cause" should be understood to exclude all intentional violations of S 110(c), Ferm did not qualify for the exception. Before filing the petitions at issue, Ferm filed a motion asking the bankruptcy court if he might omit his SSN from future petitions. The court denied his motion and instructed him that S 110(c) required him to include his SSN in connection with the petitions he prepared. After having been notified by the court of the requirements of S 110(c), Ferm chose to omit his SSN from the petitions. The district court did not err in concluding that Ferm failed to show "reasonable cause" excusing his violation of S 110(c).

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COUNSEL

William Bue, Erik Bakken, James Eustace, Allison E. Lee, Willie M. Jordan-Curtis, University of Arizona College of Law Legal Clinic, Tucson, Arizona, for the appellant.

Anne M. Lobell, United States Department of Justice, Washington, D.C., for the appellee.

OPINION

B. FLETCHER, Circuit Judge:

Appellant Jack Ferm ("Ferm") is a nonattorney bankruptcy petition preparer ("BPP"). In the course of preparing bankruptcy petitions for two debtors, Ferm did not include his own Social Security Number ("SSN") on several documents submitted to the bankruptcy court, as required by 11 U.S.C. S 110(c). The bankruptcy court subsequently imposed fines against him totaling $800 for his failure to disclose his SSN, fines that were upheld on appeal to the district court. In these appeals, Ferm contends that S 110(c) violates his constitutional rights to privacy and equal protection, as well as certain rights secured to him by S 7 of the Privacy Act. In the alternative, he argues that he has satisfied the requirements of the "reasonable cause" exception to S 110(c).

BACKGROUND

The facts are undisputed. Ferm, who characterizes himself as an "independent paralegal," assists individuals in preparing bankruptcy petitions. In mid-1995, he filed a motion with the Bankruptcy Court for the District of Nevada seeking leave to substitute an identification number other than his SSN on the bankruptcy petitions he prepares. The motion was motivated by Ferm's fear of credit card fraud. The bankruptcy court denied the motion in an order filed on August 21, 1995.

On September 5, 1995, Ibolya Rausch and Laorphus Crawford each filed pro se Chapter 7 petitions with the bankruptcy court. Each petition disclosed that Ferm had assisted in its preparation. Although Ferm completed the required disclosure forms in connection with the petitions, he omitted his SSN. In response, Appellee United States Trustee ("government")

asked the bankruptcy court to fine Ferm $24,000, require him to disgorge the fees he earned from Rausch and Crawford, and hold him in contempt of the court's August 21, 1995 order. In a published opinion, the bankruptcy court fined Ferm a total of $800 for his failure to include his SSN on the documents relating to the Crawford and Rausch petitions.1 See Ferm v. U.S. Trustee (in re Rausch), 197 B.R. 109 (Bankr. D. Nev. 1996). The district court in a published opinion affirmed the bankruptcy court. See Ferm v. U.S. Trustee (in re Rausch), 213 B.R. 364 (D. Nev. 1997). These appeals followed.

DISCUSSION

We have jurisdiction over these appeals pursuant to 28 U.S.C. 158(d). We independently review the bankruptcy court's determinations and do not give deference to the district court. See Levin v. Maya Const. (In re Maya Const.), 78 F.3d 1395, 1398 (9th Cir. 1996). Because the relevant facts here are undisputed, our review focuses on the bankruptcy court's legal conclusions, which are subject to de novo review. See Worthington v. General Motors Corp. (In re Claremont Acquisition Corp.), 113 F.3d 1029, 1031 (9th Cir. 1997).

I. The statutory framework: Section 110(c) and Section 107.

Section 110(c)2 requires that BPPs include their SSNs on all documents filed with the bankruptcy court and authorizes the imposition of a fine in the event of noncompliance. See 11 U.S.C. S 110(c). Congress enacted this provision in 1994 as part of a larger effort to regulate nonattorney bankruptcy petition preparers:

> [Section 110] adds a new section to chapter 1 of title 11 United States Code to create standards and penal ties pertaining to bankruptcy petition preparers. Bankruptcy petition preparers not employed or supervised by any attorney have proliferated across

> the country. While it is permissible for a petition preparer to provide services solely limited to typing, far too many of them also attempt to provide legal advice and legal services to debtors. These preparers often lack the necessary legal training and ethics regulation to provide such services in an adequate and appropriate manner. These services may take unfair advantage of persons who are ignorant of their rights both inside and outside the bankruptcy system.

H.R. REP. NO. 103-835, at 56 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3365; see also Fessenden v. Ireland (In re Hobbs), 213 B.R. 207, 210-11 (Bankr. D. Me. 1997) (discussing legislative history of S 110); 2 LAWRENCE P. KING, COLLIER ON BANKRUPTCYS 110.LH (15th ed. revised 1999) (same).

Ferm does not object to the bankruptcy court's collection of his SSN pursuant to S 110(c). He does, however, object to the subsequent disclosure of his SSN to the general public, an outcome that results from the fact that, by separate statutory provision, papers filed with the bankruptcy court become part of the public record. See 11 U.S.C. S 107.3 Accordingly, we limit our inquiry today to the question of whether the disclosure of Ferm's SSN violates his constitutional or statutory rights; we express no opinion regarding whether the mere collection of SSNs pursuant to S 110(c) invades any legally-protected interest of BPPs.

II. Informational privacy.

[1] While the Supreme Court has expressed uncertainty regarding the precise bounds of the constitutional "zone of privacy," its existence is firmly established. See, e.g., Whalen v. Roe, 429 U.S. 589, 599-600 (1977); Griswold v. Connecticut, 381 U.S. 479, 483 (1965). We have observed that the relevant Supreme Court precedents delineate at least two distinct kinds

of constitutionally-protected privacy interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Doe v. Attorney General, 941 F.2d 780, 795 (9th Cir. 1991) (quoting Whalen, 429 U.S. at 599-600). Ferm argues that the disclosure of his SSN implicates the first of the two threads, sometimes referred to as the right of "informational privacy." See generally Francis S. Chlapowski, Note, The Constitutional Protection of Informational Privacy, 71 B.U. L. REV. 133 (1991); see also Doe v. City of New York, 15 F.3d 264, 267 (2d Cir. 1994) (collecting cases and concluding that "[t]here is . . . a recognized constitutional right to privacy in personal information.").4

[2] We agree with Ferm that the indiscriminate public disclosure of SSNs, especially when accompanied by names and addresses,5 may implicate the constitutional right to informational privacy. As the Fourth Circuit recognized in Greidinger v. Davis, "the harm that can be inflicted from the disclosure of a SSN to an unscrupulous individual is alarming and potentially financially ruinous." Greidinger v. Davis, 988 F.2d 1344, 1354 (4th Cir. 1993).6 In an era of rampant identity theft, concern regarding the dissemination of SSNs is no longer reserved for libertarians inveighing against the specter of national identity cards. See id. at 1353 ("[A]rmed with one's SSN, an unscrupulous individual could obtain a person's welfare benefits or Social Security benefits, order new checks at a new address on that person's checking account, obtain credit cards, or even obtain a person's paycheck."). Unlike a telephone number or even a name, an individual's SSN serves as a unique identifier that cannot be changed and is not generally disclosed by individuals to the public.

[3] Judicial and legislative actions in other contexts also support the conclusion that the disclosure of SSNs can raise serious privacy concerns. See generally Flavio L. Komuves,

We've Got Your Number: An Overview of Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers, 16 J. MARSHALL J. COMPUTER & INFO. L. 529, 549-68 (1998). For example, courts have interpreted Exemption 6 of the Freedom of Information Act ("FOIA"), 5 U.S.C. S 552(b)(6), to forbid the disclosure of SSNs. See I.B.E.W. Local Union No. 5 v. HUD, 852 F.2d 87, 89 (3d Cir. 1988). Congress, for its part, has enacted measures to control the collection and dissemination of SSNs by government agencies, including the Privacy Act, discussed in more detail below, and the Driver Privacy Protection Act, 18 U.S.C. SS 2721-23 (barring states from disclosing "personal information," including SSNs, contained in motor vehicle licensing records).

[4] The right to informational privacy, however, "is not absolute; rather, it is a conditional right which may be infringed upon a showing of proper governmental interest." Doe v. Attorney General, 941 F.2d at 796. Our precedents demand that we "engage in the delicate task of weighing competing interests" to determine whether the government may properly disclose private information. Doe v. Attorney General, 941 F.2d at 796; see also Roe v. Sherry, 91 F.3d at 1274; Barry v. City of New York, 712 F.2d 1554, 1559 (2d Cir. 1983); Westinghouse, 638 F.2d at 578. Relevant factors to be considered include:

> . . . the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Doe v. Attorney General, 941 F.2d at 796 (quoting Westinghouse, 638 F.2d at 578). This list is not exhaustive, and the relevant considerations will necessarily vary from case to case. In each case, however, the government has the burden of showing that "its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." Id. In most cases, it will be the overall context, rather than the particular item of information, that will dictate the tipping of the scales. Compare Roe v. Sherry, 91 F.3d at 1274 (Navy's interest in investigating a serious crime outweighed privacy interest in HIV test results) with Doe v. City of New York, 15 F.3d at 267 (holding that HIV status generally falls within the constitutional right to informational privacy).

In filling his side of the scales, Ferm makes much of the ruinous consequences that can flow from identity theft. See Greidinger, 988 F.2d at 1353. He also notes that the bankruptcy court has not established any safeguards to prevent disclosure of his SSN to unscrupulous third parties -- as part of the bankruptcy case, a BPP's SSN becomes part of the public record, available for inspection. See 11 U.S.C. S 107(a); cf. Whalen, 429 U.S. at 600-02 (detailing security provisions built into prescription drug reporting regime); Barry, 712 F.2d at 1562-63 (describing review procedure limiting public disclosure of annual financial reports required of public officials); Westinghouse, 638 F.2d at 580 (describing safeguards employed to prevent unauthorized disclosure of employee medical records).

[5] Properly understood, Ferm's complaint is this: the disclosure of his SSN makes him vulnerable to being a victim of certain crimes. While this surely implicates Ferm's informational privacy interests, it does not appear to constitute a more serious invasion of those interests than many other requirements imposed by government. Enhanced risk, in fact, obtains anytime the government requires an individual to

deposit identifying information in the public record. 7 To weigh properly the privacy interest involved, the dire consequences of identity theft must be discounted by the probability of its occurrence. Surely government disclosure does enhance the risk of identity theft. However, the realization of the injury still requires two additional, nongovernmental elements: (1) an identity thief and (2) a vulnerable account. In that regard, Ferm's circumstance is different from the individual, for example, who is required to disclose her HIV status, sexual orientation, or genetic makeup. Unlike these personal facts, a SSN is not inherently sensitive or intimate information, and its disclosure does not lead directly to injury, embarrassment or stigma. See Richard C. Turkington, Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy, 10 N. Ill. U. L. Rev. 479, 506-08 (1990) (distinguishing between "intrinsic" and "consequential" features of private information).

[6] The government fills its scales with arguments that, in the final analysis, are more weighty than those made by Ferm. First, the government points to the important legislative purposes behind S 110, as did the courts below. See In re Rausch, 213 B.R. at 367; In re Rausch, 197 B.R. at 116. As noted above, S 110 was enacted to remedy what was perceived to be widespread fraud and unauthorized practice of law in the BPP industry. This certainly constitutes an important governmental interest. There is no doubt, moreover, that the gathering of BPP SSNs directly serves this interest by facilitating the governmental monitoring and policing of individual BPPs.

[7] Of course, the government's interest in preventing fraud relates more to SSN collection than disclosure. The disclosure of SSNs, along with the rest of the contents of documents filed with the bankruptcy court, however, serves the important purposes behind the Bankruptcy Code's "public access" provision, 11 U.S.C. S 107(a). Section 107(a) is rooted in the

right of public access to judicial proceedings, a principle long-recognized in the common law and buttressed by the First Amendment. See Nixon v. Warner Comm., Inc., 435 U.S. 589, 597-98 (1978) (recognizing common law right of access to judicial documents); see generally William T. Bodoh & Michelle M. Morgan, Protective Orders in the Bankruptcy Court: The Congressional Mandate of Bankruptcy Code Section 107, 24 HASTINGS CONST. L. Q. 67, 70-80 (1996) (describing development of S 107). This governmental interest is of special importance in the bankruptcy arena, as unrestricted access to judicial records fosters confidence among creditors regarding the fairness of the bankruptcy system. We also conclude that S 107 is not impermissibly overbroad when balanced against the speculative harms identified by Ferm. The enactment of a blanket open access rule obviously fosters public confidence in a way that a regime shot through with exceptions might not.8

[8] After weighing the relevant considerations, we conclude that the speculative possibility of identity theft is not enough to trump the importance of the governmental interests behind S 110 and S 107. In short, the balance tips in the government's favor. Accordingly, we cannot say that Congress transgressed the bounds of the Constitution in enacting the statutes at issue here.9

III. Equal protection.

[9] Ferm next argues that S 110(c) impermissibly discriminates between attorneys and nonattorneys. The Due Process Clause of the Fifth Amendment, which applies to the federal government, incorporates the Fourteenth Amendment's guarantee of equal protection. See Bolling v. Sharpe, 347 U.S. 497 (1954). Ferm concedes that S 110(c) does not burden a suspect or quasi-suspect class or a fundamental right, and that equal protection therefore demands only that the statutory

classification be rationally related to a legitimate governmental interest. See Romer v. Evans, 116 S. Ct. 1620, 1627 (1996).

[10] As noted above, the disclosure of SSNs (along with all other papers filed with the bankruptcy court) pursuant to S 107(a) is rationally related to the legitimate governmental interest in facilitating public access to the courts. This is enough to defeat Ferm's equal protection argument. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) ("[W]here rationality is the test, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.") (internal quotation omitted).

IV. Due process.

[11] Ferm contends that S 110(c) violates his substantive due process rights by conditioning his continued work as a BPP on disclosure of his SSN in the public record. While the pursuit of a profession has been recognized as a protected liberty interest, in the post-Lochner era a restriction on the con- duct of a profession will run afoul of substantive due process rights only if it is irrational. See Williamson v. Lee Optical, 348 U.S. 483, 488 (1955). In order to prevail, Ferm must establish that S 110(c) is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Wedges/Ledges of Cal., Inc. v. City of Phoenix, 24 F.3d 56, 65 (9th Cir. 1994). For the same reasons noted above in the equal protection context, Ferm has failed to satisfy this exacting standard.

V. Section 7 of the Privacy Act.

[12] The Privacy Act of 1974 includes a provision meant to control the collection and dissemination of SSNs by government agencies. See 5 U.S.C. S 552a note (1996).10 Ferm contends that the relevant bankruptcy forms that he was required to complete did not include the disclosures required

by S 7(b) of the Privacy Act. The government responds by noting that S 7(a)(2)(A) of the Privacy Act does not apply "to any disclosure which is required by Federal statute. " Id. Because the disclosure of Ferm's SSN was expressly required by S 110(c), the government reasons that S 7 is wholly inapplicable here. The government is mistaken. A close reading of S 7 makes it clear that S 7(a)(2)(A)'s exclusion for federal statutes only pertains to the limitation recited in S 7(a)(1) -- that no right, benefit, or privilege be denied to any individual for refusing to disclose her SSN.

[13] Ferm's argument, nevertheless, is unavailing. Ferm has conceded that he has no objection to the collection of his SSN, and thus has waived any objection stemming from the method of collection employed by the government here. Section 7(b) has no bearing on the public disclosure of SSNs by the government, the only issue in dispute in these appeals.

VI. The "reasonable cause" exception to S 110(c).

Ferm finally argues that he comes within the "reasonable cause" exception provided by S 110(c)(3). According to this provision, the court may fine a BPP for failing to disclose her SSN, unless "the failure is due to reasonable cause." 11 U.S.C. S 110(c)(3).

[14] The district court below interpreted "reasonable cause" to reach only situations "where the violation is unavoidable through no fault of the violator." In re Rausch, 213 B.R. at 369. Consequently, the district court found that Ferm, because he intentionally violated S 110(c), did not come within the bounds of the "reasonable cause" exception. See id. Whether or not "reasonable cause" should be understood to exclude all intentional violations of S 110(c), we find that Ferm does not qualify for the exception here. Before filing the two petitions at issue in the instant appeals, Ferm filed an ex parte motion with the bankruptcy court, asking if he might omit his SSN from

future petitions. The bankruptcy court denied his motion and instructed him that the express language of S 110(c) required him to include his SSN in connection with the petitions he prepared. After having been specifically notified by the court of the requirements of S 110(c), Ferm deliberately chose to omit his SSN from the petitions at issue. In light of these facts, the district court did not err in concluding that Ferm had failed to show "reasonable cause" excusing his violation of S 110(c).

CONCLUSION

For the reasons set forth above, the bankruptcy and district courts are hereby AFFIRMED.

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FOOTNOTES

*Honorable James R. Singleton, Chief United States District Judge for the District of Alaska, sitting by designation.

1 The bankruptcy court fined Ferm an additional $1200 for failure to include his name, address, and signature on other documents relating to the Crawford and Rausch petitions. Ferm has not challenged these fines in these appeals.

2 11 U.S.C. S 110(c) provides as follows:

> (c)(1) A bankruptcy petition preparer who prepares a document for filing shall place on the document, after the preparer's signature, an identifying number that identifies individuals who prepared the document.
>
> (2) For purposes of this section, the identifying number of a bankruptcy petition preparer shall be the Social Security account number of each individual who prepared the document or assisted in its preparation.

(3) A bankruptcy petition preparer who fails to comply with paragraph (1) may be fined not more than $500 for each such failure unless the failure is due to reasonable cause.

3 11 U.S.C. S 107 provides as follows:

(a) Except as provided in subsection (b) of this section, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.

(b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may

(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or

(2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.

4 We note that one of our sister circuits has disavowed the notion of informational privacy as a constitutionally protected interest. See J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Cir. 1981). This appears, however, to be the minority view, see Doe v. City of New York, 15 F.3d at 267; Fadjo v. Coon, 633 F.2d 1172, 1175-76 (5th Cir. 1981); United States v. Westinghouse, 638 F.2d 570, 577 (3d Cir. 1980), and is inconsistent with the law of this circuit, see Roe v. Sherry, 91 F.3d 1270, 1274 (9th Cir. 1996); Doe v. Attorney General, 941 F.2d at 795-96.

5 11 U.S.C. S 110(b) requires that BPPs include their name and address on all documents filed with the bankruptcy court.

6 Greidinger involved a constitutional challenge to a Virginia statute that effectively conditioned the right to vote on disclosure of a citizen's SSN. See Greidinger, 988 F.2d at 1352. Although Greidinger's discussion of the consequences of SSN disclosure is instructive, the court ultimately struck down the statute not on privacy grounds, but because the enactment impermissibly burdened the fundamental right to vote. See id. at 1355.

7 For example, attorneys and physicians, among others, must make certain identifying information publicly available as a condition of professional licensing. Real property owners are required to disclose their ownership interests via public title and deed records, which compromise their privacy and might assist criminals seeking well-heeled victims.

8 Section 107, in fact, admits of two exceptions to the general open access rule. See 11 U.S.C. S 107(b). These exceptions, however, are construed narrowly and do not affect our analysis regarding the public confidence fostered by the otherwise broad scope of S 107.

9 Nevertheless, Ferm has raised valid privacy concerns, and we encourage the Bankruptcy Courts to consider enacting rules to limit the disclosure of BPP SSNs.

10 Section 7 of Pub. L. 93-579 provided that:

> (a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) the provisions of paragraph (1) of this subsection shall not apply with respect to --

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.